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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RUBY R. CALAD and WALTER PATRICK THORN, Plaintiffs, v. CIGNA HEALTHCARE OF TEXAS, INC. d/b/a HEALTHSOURCE, et al., Defendants.	*	Civil No. 3:00-CV-2693-H

MEMORANDUM OPINION AND ORDER

Before the Court is the Plaintiffs' Motion to Remand, filed January 22, 2001; CIGNA's Response in Opposition, filed February 20, 2001; Aetna's Brief in Support of CIGNA's Notice of Removal, filed February 20, 2001; and Plaintiffs' separate Reply to each Response, both filed March 9, 2001. Since the close of pleadings, both sides have further filed various notices of new preemption authority, which the Court has considered. The Court heard oral arguments of counsel on the motion on April 20, 2001.

After considering the pleadings, the parties' briefs and supplemental materials, the arguments of counsel, and the relevant authorities the Court is of the opinion, for the reasons stated below, that Plaintiffs' Motion to Remand should be **GRANTED** in part and **DENIED** in part.

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I. Background

Remand of this case turns on preemption under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.* Plaintiffs together brought a state-court action against their respective health maintenance organizations ("HMOs")[1] under the liability provisions of the Texas Health Care Liability Act ("THCLA"), TEX. CIV. PRAC. & REM. CODE ANN. §88.001, *et seq.* (Vernon Supp. 2001). More specifically, Plaintiffs plead a negligence cause of action under the statute, alleging that "Defendants failed to use ordinary care in influencing, controlling, participating in and making medical necessity decisions. . . .which affected the quality of the diagnosis, care, and treatment provided to Plaintiffs." (Pet. ¶¶ 27-28). Plaintiffs further plead gross negligence, alleging that Defendants put in place "a knowing, calculated scheme whereby the Defendants increased their profits by adversely affecting the medical care for patients such as [Plaintiffs] through the Defendants' own decisions regarding medical necessity." (Pet. ¶ 36). As discussed more fully below, Plaintiffs each allege that the respective Defendants' medical necessity decisions wrongfully interfered with the recommendations of Plaintiffs' treating physicians, and that they suffered damages as a result. Plaintiff Calad challenges a medical necessity decision regarding the length of her hospital stay following surgery (Pet. ¶¶ 3-4), and Plaintiff Thorn challenges the delayed approval of surgery following his injury in an accident (Pet. ¶¶ 5-7).

The CIGNA Defendants timely removed the case to federal court on December 11, 2000, pursuant to 28 U.S.C. §§1441(a) and (b). CIGNA contends that Plaintiffs' state-law

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[1] Plaintiff Calad sued Defendants CIGNA HealthCare of Texas, Inc. d/b/a Healthsource and CIGNA Corporation (collectively, "CIGNA"). Plaintiff Thorn sued Aetna U.S. Healthcare, Inc. and Aetna U.S. Healthcare of North Texas, Inc. (collectively, "Aetna").

claims are all completely preempted by ERISA, *see* 29 U.S.C. §§501, 502, and thus removable based on this Court's federal question jurisdiction, 28 U.S.C. §1331. The Aetna Defendants subsequently joined in and consented to the removal, in a separate pleading filed December 12, 2000. (*See also* Defs.' Not. Removal ¶ 7).

II. Analysis

A. Federal Question Removal Under ERISA

CIGNA bears the burden of showing that its removal was proper and establishing this Court's jurisdiction over the case. The propriety of removal is determined by the complaint at the time of removal, and federal question jurisdiction generally turns on whether a federal question is presented on the face of a properly pleaded complaint. The well-pleaded complaint rule, however, is qualified by the doctrine of "complete preemption," which recognizes that "Congress may so completely preempt a particular area that any civil complaint raising [a] select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1986).

In the context of ERISA, there are two types of preemption. First, if a claim seeks the type of relief provided through ERISA's exclusive civil enforcement provision, there is "complete preemption." This provision, Section 502(a) of ERISA, encompasses claims by an ERISA plan participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. §1132(a)(1)(B). Second, there is so-called "conflict preemption" or "ordinary preemption" under Section 514(a) of ERISA, which preempts state laws insofar as they "relate to" an employee benefit plan covered by ERISA. 29 U.S.C. §1144(a). As both sides acknowledge in this case, removal on federal question jurisdiction can

only be based on Section 502(a) preemption. *See Copling v. The Container Store, Inc.*, 174 F.3d 590, 595 (5th Cir. 1999); 29 U.S.C. §1132(f).

As stated above, Section 502(a) preemption is a jurisdictional question, in which the Court must determine whether Plaintiffs are seeking the same relief as exclusively provided under the ERISA statute. "A case may be removed even if no federal claim is asserted in the complaint and federal preemption, raised as a defense, is the only issue of federal law implicated in the case." *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994) (citing *Taylor*, 481 U.S. at 62-64). A claim "within the scope" of Section 502(a) presents a federal question, and a basis for removal, no matter how artfully pleaded as a state cause of action. *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 337 (5th Cir. 1999); *Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493, 500-01 (5th Cir. 1999).

The Court considers separately whether to remand the claims of each of the Plaintiffs.

B. Ruby Calad's Claims

1. Applicability of Section 502(a)

As a threshold matter, the Court considers the significance of the nature of CIGNA's role in Calad's claims, for purposes of Section 502(a) preemption. It is undisputed that Calad's health care was provided by CIGNA under an ERISA-governed plan, made available to Calad through her husband's employer. Calad argues, however, that her state-law claim cannot be completely preempted because she sues her HMO, not the ERISA plan itself. CIGNA maintains that it (the HMO) performed various administrative functions in connection with the plan in Texas, including the provision of utilization review services and making benefit determinations under the plan. (CIGNA's Resp. App., Affidavit of John W. Wargo, ¶ 6). The

Court concludes that ERISA's Section 502(a) remedial scheme extends not only to claims against ERISA plans, but also to claims against administrators of such plans, including providers of utilization review services, at the heart of Plaintiffs' claims in this case. *See Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir.), *cert. denied*, 506 U.S. 1033 (1992). The Court sees no reason to treat CIGNA differently in this regard, simply because the utilization review function is performed by personnel of the HMO rather than some third-party entity.

2. Complete Preemption

The Court's analysis focuses on whether Calad's purported quality-of-care claim against her HMO is properly read as a completely preempted federal claim. ERISA Section 502(a) provides the civil enforcement mechanism for claims arising from a denial of benefits or other coverage determination and thus completely preempts any state law cause of action seeking the same relief. *See Giles*, 172 F.3d at 336-37; *McClelland v. Gronwaldt*, 155 F.3d 507, 516-17 (5th Cir. 1998). The Fifth Circuit employs a two-step analysis of "complete preemption," considering first whether the claim is subject to ordinary preemption under Section 514(a) and only then whether the claim falls within the scope of Section 502(a). *McClelland*, 155 F.3d at 517. Claims against an HMO (or related managed care entity) for the manner in which it handled claims or for withholding of benefits or denial of a particular procedure have been held completely preempted. *See Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1017 (5th Cir. 1993); *Corcoran*, 965 F.2d 1321 (5th Cir.1992). In basic terms, claims challenging the administration of a benefits plan and claims based upon a failure to treat where the failure resulted from a determination that the requested treatment, or quantity of treatment, was not covered by the plan are preempted by ERISA. Claims challenging health care treatment

decisions or the quality of care fall within the realm of negligence and medical malpractice, and are not preempted.

At the intersection of pure coverage claims and state law quality-of-care claims lie "medical necessity" or "utilization review" determinations by HMOs or related managed care entities, at issue in *Corcoran* and in this case. In *Corcoran*, the Fifth Circuit held preempted the plaintiffs' wrongful death claim, brought under Louisiana negligence law, against the ERISA plan administrator whose utilization review had denied pre-certification of hospitalization for Mrs. Corcoran. 965 F.2d 1321. Under a Section 514(a) analysis, the Fifth Circuit concluded that "[i]n our view, United makes medical decisions as part and parcel of its mandate to decide what benefits are available under the [ERISA] plan. . . .The principle of *Pilot Life* that ERISA pre-empts state-law claims alleging improper handling of benefit claims is broad enough to cover the cause of action asserted here." *Id.* at 1332.

Calad brings a cause of action only under THCLA, and expressly denies that she seeks recovery of benefits under her ERISA plan. (Pet. ¶34). Calad alleges that during "pre-authorization and coverage procedures," CIGNA informed her that it authorized only one day of hospitalization following her scheduled surgery (a vaginal hysterectomy). (Pet. ¶ 18). On the second day after the surgery, a hospital discharge nurse, a CIGNA representative, allegedly informed Calad's treating physician (Dr. Estrada) that Calad must be discharged if she did not manifest hemorrhaging, fever or high blood pressure; absent any of these symptoms, Calad could extend her hospital stay only if she assumed the cost. (Pet. ¶ 20). She "did not qualify under CIGNA's medical necessity criteria for continued hospital stay and was unable to incur the expense personally." (Pet. ¶¶ 4, 21). Calad characterizes CIGNA's determination as "negligent adherence" to its medical necessity criteria (Pet. ¶ 3), and further alleges that CIGNA "put in

place and enforced their system of health care delivery" in a manner which was consciously indifferent to her rights, safety and welfare. (Pet. ¶ 36).

Notwithstanding Calad's characterization of her claim as one arising under THCLA, the Court must determine whether her pleadings, fairly construed, challenge CIGNA's administration of plan benefits or the quality of care she received. The Texas statute provides for a negligence cause of action against HMOs and other managed care entities in certain circumstances.[2] The statute also expressly provides that the standard of care it establishes for treatment decisions creates no obligation on the part of HMOs or other managed care entities "to provide to an insured or enrollee treatment which is not covered by the health care plan of the entity." TEX. CIV. PRAC. & REM. CODE §88.002(d). The Fifth Circuit took note of this statutory disclaimer in its opinion last year reviewing a facial ERISA preemption challenge to the provisions of Section 88: "The provisions do not encompass claims based on a managed care entity's denial of coverage for a medical service recommended by the treating physician: that dispute is one over coverage, specifically excluded by the Act." *Corporate Health Ins., Inc. v. Texas Dept. of Ins.*, 215 F.3d 526, 534 (5th Cir. 2000) ("*Corporate Health I*").

Plaintiffs maintain that the managed care entities' determinations in their cases are "mixed medical decisions" outside the realm of ERISA preemption, relying on the Supreme Court's decision last term in *Pegram v. Herdrich*, 530 U.S. 211 (2000), and the oft-cited "trilogy" of Supreme Court cases that have limited somewhat the expansive scope of Section

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[2] Specifically, an HMO or other managed care entity has a duty to exercise ordinary care when making "health care treatment decisions" and is liable for damages for harm proximately caused to an insured or enrollee by the entity's breach of that duty. TEX. CIV. PRAC. & REM. CODE §88.002(a). The statute defines such a decision as "a determination made when medical services are actually provided by the health care plan and a decision which affects the quality of the diagnosis, care, or treatment provided to the plan's insureds or enrollees." TEX. CIV. PRAC. & REM. CODE §88.001(5).

514(a) preemption.[3] Plaintiffs correctly argue that the presumption is against ERISA preemption of state laws in areas which have traditionally been the domain of the states, such as health care regulation, unless Congress has clearly demonstrated an intent toward preemption. *See Travelers*, 514 U.S. at 654-55; *see also Egelhoff v. Egelhoff*, ___ U.S. ___, 121 S. Ct. 1322 (2001).

The Court does not agree, however, that the Supreme Court's holding in *Pegram*, which was not a preemption case, compels the conclusion that utilization review determinations such as those made by CIGNA in this case are not preempted. The Fifth Circuit, in its opinion denying panel and en banc rehearing of *Corporate Health I*, did "not read *Pegram* to entail that every conceivable state law claim survives preemption so long as it is based on a mixed question of eligibility and treatment, and *Corcoran* held otherwise." *Corporate Health Ins., Inc. v. Texas Dept. of Ins.*, 220 F.3d 641, 643-44 & n.6 (5th Cir. 2000) ("*Corporate Health II*"), *petition for cert. filed*, 69 U.S.L.W. 3317 (U.S. Oct. 24, 2000) (No. 00-665); *see also Roark*, 2001 WL 585874, at *4 ("If [Calad] were suing [CIGNA] for breach of fiduciary duty under ERISA based on a mixed eligibility decision made by a [CIGNA] physician, *Pegram* would hold that [CIGNA] could not be held liable for breach of fiduciary duty because the decision was not a fiduciary decision under ERISA").

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[3] *See De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997) (statute imposing tax on medical centers' gross receipts from patient services not preempted); *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316 (1995) (prevailing wage statute regarding public works contractors not preempted); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (statute regulating hospital rates for in-patient care, imposing surcharges on commercially insured patients but not on those insured by Blue Cross/Blue Shield or HMOs, not preempted).

The Fifth Circuit has recently decided, post-trilogy and post-*Pegram*, the extent to which THCLA's provisions are preempted by ERISA. The court, reviewing under Section 514(a) analysis a facial challenge to the provisions of THCLA, concluded that the liability provisions of the Texas statute are not preempted. *Corporate Health I*, 215 F.3d at 534-35.[4] The court reasoned that the vicarious liability of the entity for the negligence of a treating physician does not "relate to" the managed care provider's role as an ERISA plan administrator so as to require preemption. *Id.* The panel reiterated that the state's efforts to regulate an entity in its capacity as plan administrator are preempted, while the entity's functions as a medical care provider are within the traditional sphere of state regulation. *Id.* at 534-35 & n. 24 (noting *Corcoran*'s holding that medical decisions involving coverage determinations are preempted). Based on the Fifth Circuit's reasoning in *Corporate Health* regarding Section 514(a) (non)preemption of certain portions of THCLA, including its discussion of the statutory disclaimer discussed above, the Court concludes that Calad's claims satisfy the preliminary inquiry–ordinary preemption–under *McClelland.*

At the heart of Plaintiffs' Motion to Remand is their extensive argument that, in light of *Pegram* and the trilogy, *Corcoran* is simply no longer good law. (Pls.' Reply Br. to Aetna, at 3-6; Oral Arg. Tr. at 31-32). Plaintiffs' fundamental problem, in this Court's view, is that *Corcoran* remains the law in the Fifth Circuit with respect to ERISA preemption of medical decisions made pursuant to utilization review. As Defendants point out, courts concluding that claims arising from a delay or denial of benefits are ERISA-preempted continue to cite the case

[4] The panel did find preempted Senate Bill 386's provisions, codified in the Texas Insurance Code, for independent review of medical necessity determinations by managed care entities, noting that they created a "quasi-administrative procedure for the review of such denial and bind the ERISA plan to the decision of the independent review organization." *Id.* at 539.

with approval. *See, e.g., Pryzbowski v. U.S. Healthcare, Inc.*, 2001 WL 292997, at *11 (3rd Cir. Mar. 27, 2001); *Roark v. Humana, Inc.*, 2001 WL 585874, at *4 (N. D. Tex. May 25, 2001) (Fitzwater, J.); *Cristantielli v. Kaiser Found. Health Plan of Texas*, 113 F. Supp.2d 1055, 1063-64 (N. D. Tex. 2000) (Solis, J.). Moreover, the Court concludes that the nature of Calad's claim distinguishes her case from others brought under THCLA and remanded to state court as quality-of-care claims. *See, e.g., Murray v. Huynh*, No. 00-CV-2161-R (N. D. Tex. Jan. 11, 2001) (Kaplan, J.); *Rice v. Kaiser Found. Health Plan of Texas, Inc.*, No. 99-CV-0714-L (N. D. Tex. Sept. 27, 2000) (Lindsay, J.); *Phommyvong v. Muniz*, No. 98-CV-0070-L, 1999 WL 155714 (N. D. Tex. Mar. 11, 1999) (Lindsay, J.).

Returning to Calad's pleadings, the Court concludes that, despite the negligence labeling under which she claims direct liability against her HMO under Texas law, Calad's claim is fundamentally one in which she challenges the quantity of care she received as a result of CIGNA's utilization review. To the extent that CIGNA's employee, agent or representative (as alleged here, CIGNA's hospital discharge nurse), may have "negligently adhered" to the HMO's medical necessity criteria, she was performing a function of ERISA plan administration. This is certainly the case with respect to the *pre-surgery* authorization of one day of hospitalization for Calad, which the Court notes is consistent with the ERISA plan's provisions.[5] Regarding the alleged *post-surgery* determination that Calad did not meet the criteria for additional hospitalization coverage,[6] the conclusion is ultimately the same. CIGNA's decision impacted on

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[5] The relevant plan documents indicate that only one day of hospitalization following the procedure (vaginal hysterectomy) is covered, unless certain symptoms were observed or the treating physician considered an additional stay necessary. (CIGNA's App. Supp. Resp. at 99).

[6] The Court notes that Calad alleges that her doctor's nurse assured her in advance that she could remain hospitalized if her doctor determined it was necessary (Pet. ¶18), but she has not

Calad's care, to the extent that any medical necessity determination impacts an insured; the decision, however, was essentially one regarding the amount and type of services for which Calad was covered under the plan.

The Court further notes that Calad has made no other allegation that can fairly be read to challenge the quality of the care she received. She has not claimed negligence by Dr. Estrada or by any other CIGNA personnel who participated in her treatment and decisions related to it. *See Roark*, 2001 WL 585874, at *3. Moreover, her allegations regarding CIGNA's implementation of its health care delivery systems, while couched in terms of negligence, instead reflect a claim regarding CIGNA's administration of benefits. The Court therefore concludes, completing the *McClelland* inquiry, that Calad's claims are within the scope of ERISA Section 502(a) and thus are completely preempted.

Plaintiffs complain that Judge Higginbotham's two opinions in *Corporate Health* do not adequately address the authorities under which Plaintiffs challenge the ongoing validity of *Corcoran* and maintain that THCLA supports a direct liability cause of action against their HMOs. More specifically, Plaintiffs call for a more exhaustive examination of *Pegram*, the trilogy, and the legislative history of both ERISA and the Health Maintenance Organization Act of 1973. (Pls.' Br. Supp. Mot. Remand, at 14-17; Pls.' Reply Br. to CIGNA, at 3-6; Pls.' Reply Br. to Aetna, at 9-10). Plaintiffs seek, in the context of an as-applied challenge, further interpretation from the Fifth Circuit on whether THCLA claims arising from HMOs' medical necessity determinations are ERISA-preempted. This Court declines Plaintiffs' invitation to

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clearly alleged that her treating physician articulated such a recommendation after her surgery or otherwise attempted to override the determination of the discharge nurse.

conclude that *Corcoran* is no longer good law in light of *Corporate Health* and the other authorities mentioned above, leaving this review appropriately to the appellate court.

For the reasons stated above, the Court concludes that Calad's claim brought under THCLA is, at bottom, not about quality of care but rather about her HMO's coverage determination and administration of her benefits. The Court therefore holds that Calad's claims against CIGNA are completely preempted and were properly removed under federal question jurisdiction; Plaintiff's Motion to Remand is therefore **DENIED** with respect to Calad's claims. Further, the Court notes that Calad has repeatedly made clear that, should the Court deny her motion to remand, she will not amend her pleading to bring an ERISA claim and therefore requests that her claims be dismissed. (Pls.' Reply Br. to CIGNA, at 2; Pls.' Reply Br. to Aetna, at 2-3; Oral Arg. Tr. at 5). Accordingly, Plaintiff Calad's claims are hereby **DISMISSED WITH PREJUDICE.**

C. Walter Thorn's Claims

As Plaintiffs point out, Aetna's consent to removal notwithstanding, Aetna itself could not have removed Thorn's claims against it. Thorn receives his health insurance through his employer, the Azle Independent School District. (Pet. ¶ 22). The ERISA statute makes clear that the complete preemption provisions "shall not apply to any employee benefit plan if such plan is a governmental plan." 29 U.S.C. §1003(b)(1). *See also* 29 U.S.C. §1144 (ERISA's conflict-preemption provisions do not apply to any employee benefit plan exempt under Section §1003(b)). The term "governmental plan" includes one "established or maintained for its employees . . . by the government of any State or political subdivision thereof, or by any agency

or instrumentality of any of the foregoing." 29 U.S.C. §1002(32). ERISA, therefore, does not preempt Thorn's claims against Aetna.

The parties, however, have addressed various alternative bases for this Court to retain jurisdiction over Thorn's claims.[7] First, Defendants maintain that, the Court having proper removal jurisdiction over Calad's federal claim, it may exercise supplemental jurisdiction over Thorn's claim. *See Giles*, 172 F.3d at 337. In the context of its discretion regarding supplemental jurisdiction, the Court considers the relatedness of Calad's and Thorn's claims. Defendants argue that the Plaintiffs have only their counsel in common and that their claims were improperly joined to defeat preemption and federal jurisdiction (CIGNA's Resp. Br. at 5, 7-8). Plaintiffs maintain that Congress did not intend the inconsistent result that quality-of-care claims brought by ERISA plan beneficiaries (like Calad) are preempted, while nearly identical claims by beneficiaries of government plans (like Thorn) are not. (Pls.' Br. Supp. Mot. Remand, at 8-9). Given the plain statutory language exempting from ERISA coverage governmental plans such as that in which Thorn participated, this Court declines to conclude that Congress could not have intended Calad's and Thorn's claims to fare differently under ERISA preemption analysis. This question of statutory interpretation and public policy is more appropriately left for the appellate court, in the larger context of defining the current state of the law on preemption of medical necessity decisions by managed care entities.

Second, at oral argument Defendants' counsel further contended that the Court properly has jurisdiction over Thorn's claim because the Plaintiffs' Petition alleges that Defendants are jointly and severally liable for the alleged damages to Plaintiffs. (Oral Arg. Tr.

[7] The Court notes here that federal question jurisdiction was the sole basis on which removal of this case was predicated. (CIGNA's Not. Removal ¶¶ 4-5).

at 22). Although the allegations as pleaded at the time of removal are the proper basis for the Court's analysis of its removal jurisdiction, the Court considers Defendants' argument to be extremely thin support for jurisdiction over Thorn's claim, in the larger context of this case. Moreover, Plaintiffs' counsel on the record has expressly withdrawn Plaintiffs' allegations of joint and several liability against the respective Defendants, conceding that the inclusion of such allegations was a pleading error. (Oral Arg. Tr. at 32).

For the foregoing reasons, this Court concludes that Calad's claim is a separate and independent claim within the Court's federal question jurisdiction, joined with Thorn's otherwise non-removable claim. The Court hereby exercises its discretion to sever and remand Thorn's claim, which is governed by state law. *See* 28 U.S.C. § 1441(c).

III. Conclusion

For the foregoing reasons, the Court concludes that Plaintiff Calad's claims were properly removed, and the Motion to Remand is therefore **DENIED** with respect to Calad. As requested in the alternative by Calad, her claims against CIGNA are **DISMISSED WITH PREJUDICE**. The Motion to Remand is **GRANTED** with respect to Plaintiff Thorn, and his claims are hereby **REMANDED** to the 162nd Judicial District Court of Dallas County, Texas.

SO ORDERED.

DATED: June 20, 2001

BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS